A **LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA**

v.

RICHMATT HOLDING (M) SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: S-21-180-2009]
16 AUGUST 2010

C ***CIVIL PROCEDURE:*** *Summary judgment - Triable issue - Court to consider quality of issue raised and not number of issues raised*

CIVIL PROCEDURE: *Summary judgment - Triable issue - Settlement - Whether a mere assertion that a settlement has been reached without supporting evidence creates a triable issue*

D ***COMPANY LAW:*** *Directors - Liability of directors - Liability to pay outstanding EPF contributions - Whether civil claim against company and directors prohibited due to previous criminal prosecution against company - Employees Provident Fund Act 1991, s. 46*

E ***LABOUR LAW:*** *Provident fund - Contributions - Claim against company and directors for outstanding EPF contributions - Whether amount certified as owing in Form EPF 7 (Form E) correct - Whether claim defeated by existence of a settlement agreement between parties - Whether civil claim against company and directors prohibited due to previous criminal prosecution against company - Employees Provident Fund Act 1991, ss. 46, 64*

F

The first defendant was a company having a number of employees in its payroll. The second, third and fourth defendants were all directors of the company at the material time. The first defendant had failed to pay EPF contributions amounting to RM696,803. The first defendant G had made a part payment amounting to RM173,722 but failed to settle the whole amount outstanding. The plaintiff commenced a civil claim against the defendants for the balance sum of RM523,031 and sought summary judgment of the claim. The calculation of the arrears of unpaid contribution was set out in Form EPF 7 (Form E) Employees Provident H Fund Act 1991 ('EPF Act') in the plaintiff's affidavit in support. The defendants raised the following issues as triable issues: (i) that the amount certified as owing was incorrect; (ii) that there was a collateral agreement in that there was a settlement agreement between the parties; and (iii) that since criminal prosecution had taken place against the first I defendant, the plaintiff now could not recover the amount outstanding by way of a civil claim against the first defendant and its directors.

Held (allowing plaintiff's application for summary judgment with cost):

(1) Form EPF 7 had been exhibited in the plaintiff's affidavit in support and there was nothing to suggest that it had not been properly prepared by the Inspector. Further there was also a certificate issued pursuant to s. 64 of the EPF Act with respect to the arrears of EPF contributions. (paras 11 & 12)

(2) The defendant failed to discharge the *prima facie* evidence of their indebtedness by adducing evidence to the contrary. Merely saying that one does not agree or make no admission as to the amount owing that had been so certified was insufficient to discharge the burden that has shifted to the defendants. (para 14)

(3) A mere assertion that a settlement had been arrived at when there is no evidence to substantiate it cannot create a triable issue. Otherwise all that defendants needed to do to defeat a summary judgment application was to canvass all the defences known under the law and to state that in the defence filed and to dress them properly in the affidavits to oppose the application. Surely it is not the number of issues raised that is the final determinant as to whether a triable issue has been raised but the quality of the issues raised; *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* (refd). (para 16)

(4) The third issue was without merit. The liability of the directors for non-payment of contributions of EPF under s. 46 of the EPF Act has received judicial interpretation in the Court of Appeal in *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja*. (paras 20-22)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja [2009] 6 CLJ 586 CA ***(refd)***

Legislation referred to:

Employees Provident Fund Act 1991, ss. 14(1), (3), 45(3), 46, 49, 64, 65(1)

Employees Provident Fund Rule 1991, r. 28

Rules of the High Court 1980, O. 14

For the applicant - Noor Asnie M Salleh; M/s Edlin Ghazaly & Assocs
For the respondents - Cherian Kuruvila; M/s Feroz & Co

Reported by Amutha Suppayah

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JUDGMENT

Lee Swee Seng JC:

Prologue

B **[1]** The Employees Provident Fund was established under the Employees Provident Fund Act 1991 ("EPF Act") as a compulsory savings for all citizens employed under a contract of service with the private sector in Malaysia. The employer would contribute 12% of the employees' basic salary to the fund every month and the employee 11% of his salary. Through the years it has given an annual dividend of higher rate compared to savings in fixed deposits from the commercial banks. Withdrawals are allowed for a house and for major medical treatment and upon reaching 50 years of age one is entitled to withdraw the whole amount contributed plus the dividends earned.

D **[2]** However there are problems when the employer fails to contributing to the EPF for its employees. Generally that is a first sign of a company in distress. The employees feel aggrieved because his half yearly statement showed no change in the statement of contributions he has in his EPF account and yet the employer has been deducting the E employee's salary portion of the EPF contribution.

[3] This is compounded further by the employer not contributing the employer's portion of the EPF contribution. Complaints would be made by the employees and upon completion of investigation by the EPF Board, both criminal charges and civil claims would be filed against the F company and the directors concerned so as to protect the interests of the employees who only have their EPF savings as the only financial security upon retirement.

Parties

G **[4]** The plaintiff is established under the EPF Act and under s. 14(1) it has such powers and shall perform such duties as are given or imposed by the EPF Act. Under s. 14(3) it may employ *inter alia* advocates and solicitors to transact any business or do any act required to be transacted or done in the exercise of its powers or in the carrying H out of its duties or for the better carrying into effect of the purposes of the EPF Act.

[5] The 1st defendant is a company incorporated in Malaysia and having a number of employees in its payroll. The 2nd, 3rd and 4th I defendants are all directors of the company at the material time.

Problems

[6] The 1st defendant had failed to pay EPF contributions from January 2007 until February 2008 amounting to RM696,803 and the calculation of the arrears of unpaid contribution is set out in Form EPF 7 (Form E) EPF Act in the affidavit in support of the plaintiff's application for summary judgment.

[7] The 1st defendant had also made a part payment amounting to RM173,722 but failed to settle the whole amount outstanding. The plaintiff in the discharge of its public duty had commenced this civil claim against the defendants for the balance sum of RM523,031 together with dividends at different rates for the different years and also interests and cost. Prior to that, notices of demand had been issued on all the defendants on 26 May 2008 and copies and proof of posting are all exhibited in the plaintiff's affidavit in support.

Prayers

[8] The O. 14 of the Rules of the High Court 1980 ("RHC") was taken out for the following:

(i) Outstanding EPF contributions for the employees of the 1st defendant from January 2007 to February 2008 for the sum of RM523,031 from the 1st defendant, 2nd defendant, 3rd defendant and 4th defendant.

(ii) Dividend of 5.80% per annum for year 2007, 4.50% per annum for year 2008 and subsequent dividends as declared by EPF board for each year until the date of full realisation.

(iii) Interest of 6.00% per annum for the time period from 24 February 2006 until 6 February 2007, 6.15% interest a annum from the time period from 7 February 2007 until 23 January 2008, 6.80% per annum for the time period from 24 January 2008 until the date fixed by the EPF board and subsequent interest as declared by the EPF board for each year until the date of full realisation.

Principles

[9] The law journals are replete with a legion of cases on the principles governing an O. 14 application. If a restatement of the approach that the courts have consistently taken is necessary by way of reminder, then reference can be made to the Federal Court case of

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 at p. 285 in the speech of George Seah FJ:

> We think it appropriate to remind ourselves once again that in every application under O.14 the first considerations are (a) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding with O. 14. …
>
> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see O. 14 r. 3 and 4(1)).

First Triable Issue: That The Amount Certified As Owing Is Incorrect

[10] The relevant portion of r. 28 of the EPF Rules 1991 reads:

> Where an employer has for any reason whatsoever not paid any contributions either wholly or partially by the twenty-first day of the month … such employer shall submit to the Board a schedule of arrears of contributions in Form EPF 7 (Form E) either assessed by the Inspector or declared by the employer himself and an arrears remittance statement in the Form EPF 8 (Form F) together with any contributions omitted to have been paid.

[11] Form EPF 7 had been exhibited in the plaintiff's affidavit in support and there is nothing to suggest that it had not been properly prepared by the Inspector.

[12] Further there was also a certificate issued pursuant to s. 64 of the EPF Act with respect to the arrears of EPF contributions and s. 64 reads:

> In any legal proceedings, a certificate in relation to a claim on contributions payable and duly certified by an authorized officer of the Board shall be *prima facie* evidence of such certificate having been made and of the truth of the contents thereof.

[13] The defendants submitted that there is no provision for the plaintiff to issue and assess Form EPF 7 through its inspector and that the Form EPF 7 has to be declared by the employer. I find no merit in that argument as to do so would go against the clear provision of EPF Rules which provides that Form EPF 7 can either be declared by the employer or assessed by the Inspector of the plaintiff and one does have to be blessed with much imagination to countenance circumstances where such an assessment is necessary as in cases where there has been dereliction of duty or delay or even defiance in submitting the said Form.

[14] The defendant has also failed to discharge the *prima facie* evidence of their indebtedness by adducing evidence to the contrary and by merely saying that one does not agree or make no admission as to the amount owing that has been so certified is insufficient to discharge the burden that has shifted to the defendants.

Second Triable Issue: That There Was A Collateral Agreement In That There Was A Settlement Agreement Between The Parties

[15] Exhibit RM1 in the defendants' affidavit disclosed that the 1st defendant had made admission of the amount of RM755,455 outstanding in their letter of 30 April 2008. The payment of RM173,772 was acknowledged by the plaintiff. As to how the plaintiff had agreed to accept the part payment of RM173,772 and hence settled with the defendants is not stated. It is a long short at creating a triable issue when there is none. One would have expected a clear and unequivocal acceptance extracted from the plaintiff in no uncertain terms if indeed there is a settlement surmised and submitted by the defendants' counsel.

[16] A mere assertion that a settlement had been arrived at when there is no evidence to substantiate it cannot create a triable issue. Otherwise all that defendants need to do to defeat an O. 14 application is to canvass all the defences known under the law and to state that in the defence filed and to dress them properly in the affidavits to oppose the application and that would have done the trick! Surely it is not the number of issues raised that is the final determinant as to whether a triable issue has been raised but the quality of the issues raised. I can do no better than to repeat the reminder issued by Mohd Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 at p. 19:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[17] The defendants also sought to attack the correctness of the amount outstanding by asserting that the dividends and interests imposed are questionable. Again these are rates that the plaintiff had

published in the electronic and print media. In the absence of contrary evidence the court will have to accept the rates to be correct. These rates are for the benefit of the employees any way and again it is imprudent of the defendants to suggest otherwise in the absence of evidence to the contrary.

[18] It might be appropriate at this juncture to refer to the EPF Act where the liability of the employer to pay dividends and interest on the arrears of contributions of the employer's and employee's contributions are concerned. s. 45(3) provides *inter alia*:

> Notwithstanding section 49, ... , the employer shall in addition to such contributions be liable to pay dividend which would have accrued on such contributions if such contributions had been paid to the employer within the prescribed period at the rate as declared under section 27 in accordance with any manner and calculation determined by the Board:

[19] Section 49 EPF Act provides for the imposition of interest as follows:

> Where the amount of the monthly contributions or part of any monthly contributions which an employer is liable to pay under section 45 is not paid within such period as prescribed by the Minister, *the employer shall be liable, in addition to the dividend to be paid under subsection 45(3), to pay interest to be credited to the Fund on such amount at such rate and it accordance with any manner and calculation determined by the Board.* (emphasis added).

Third Triable Issue: That The Criminal Prosecution Having Been Taken Against The 1st Defendant, The Plaintiff Now Cannot Recover The Amount Outstanding By Way Of A Civil Claim Against The 1st Defendant And Its Directors

[20] The above contention is without merit. The relevant part of s. 46 of the EPF Act provides:

> Where any contributions remaining unpaid a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, **the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid**, ... shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund. (emphasis added)

[21] Section 65(1) of the EPF Act further provides:

> Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

[22] The liability of the directors for non-payment of contributions of EPF under s. 46 of the EPF Act has received judicial interpretation in the Court of Appeal in *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 6 CLJ 586 at p. 593 where His Lordship Ramly Ali JCA said:

> The liability under s. 46 on the appellants is created by statute 'directly' and 'personally' on the appellants as directors or former directors of the 1st defendant company. *Thus the contributions due and payable become the debt of the appellants personally, jointly and severally with the company. Therefore, the appellants' argument that they were "not personally liable for the debt of the company" cannot hold water.* (emphasis added).

Pronouncement

[23] Having considered all the above arguments raised by the defendants' counsel in seeking to raise a triable issue, I am more than satisfied that no single issue that merit going for trial has been raised. In the circumstance I granted an order in terms of the plaintiff's application for summary judgment with cost.